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EDITOR'S NOTE

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(SHOW) PROCEEDINGS AND ORDERS DATE: 120385

CASE NBR 84-1-01634 CFX
SHORT TITLE Cuyahoga Valley DOCKETED: Apr 12 1985
VERSUS United Trans. Union, et al.

Date	Proceedings and Orders
Apr 12 1985	Petition for writ of certiorari filed.
May 2 1985	Order extending time to file response to petition until June 3, 1985.
May 2 1985	Above extension is for the United Transport. Union.
May 15 1985	Order extending time to file response to petition until June 15, 1985.
May 15 1985	Above extension is for the Solicitor General.
May 30 1985	Order further extending time to file response to petition until July 15, 1985.
May 30 1985	Above extension is for the United Transport Union
Jun 14 1985	Order further extending time to file response to petition until July 30, 1985.
Jun 14 1985	Above extension is for ALL RESPONDENTS.
Jul 8 1985	Order further extending time to file response to petition until August 30, 1985.

CONTINUE (
(SHOW) PROCEEDINGS AND ORDERS DATE: 120385

CASE NBR 84-1-01634 CFX
SHORT TITLE Cuyahoga Valley DOCKETED: Apr 12 1985
VERSUS United Trans. Union, et al.

Date	Proceedings and Orders
Aug 27 1985	Brief of respondent United Transportation Union in opposition filed. VIDED.
Sep 11 1985	DISTRIBUTED. September 30, 1985
Sep 11 1985	REDISTRIBUTED. September 30, 1985
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985
Nov 4 1985	Petition GRANTED. Judgment REVERSED. Justice Brennan and Justice Blackmun dissent from summary disposition. They would grant certiorari and set the case for oral argument. Dissenting statement from summary disposition by Justice Marshall. Opinion per curiam. (Detached

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2

by Justice Marshall. Opinion per curiam. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

84-1634

Office - Supreme Court, U.S.
FILED
APR 12 1985
ALEXANDER L. STEVAS,
CLERK

No.

Supreme Court of the United States

October Term, 1984

CUYAHOGA VALLEY RAILWAY COMPANY,
Petitioner,

v.

SECRETARY OF LABOR,

UNITED TRANSPORTATION UNION

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

DAVID J. MILLSTONE
Counsel of Record
THOMAS H. BARNARD
RICHARD T. PRASSE
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500
Attorneys for Petitioner
Cuyahoga Valley
Railway Company

Of Counsel:
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115

QUESTIONS PRESENTED

1. Does the Secretary of Labor, as exclusive prosecutor, have the authority to unilaterally withdraw a citation, issued by the Occupational Safety and Health Administration, after filing a complaint?

2. Are employees, or their authorized representatives, permitted to participate in Occupational Safety and Health Act proceedings before the Occupational Safety and Health Review Commission for other than a challenge to the reasonableness of the time allowed for abatement?

PARTIES TO THE PROCEEDING BELOW

Cuyahoga Valley Railway Company* was the petitioner in the Court of Appeals in Case No. 82-3773. The Secretary of Labor was the petitioner in the Court of Appeals in Case No. 82-3771. The respondents in both cases were the United Transportation Union and the Occupational Safety and Health Review Commission. The cases were consolidated for review by the Court of Appeals.

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* Petitioner Cuyahoga Valley Railway Company is a wholly owned subsidiary of LTV Steel Company Incorporated which is itself wholly owned by LTV Corporation.

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No.

Supreme Court of the United States

October Term, 1984

CUYAHOGA VALLEY RAILWAY COMPANY,
Petitioner,

v.

SECRETARY OF LABOR,
UNITED TRANSPORTATION UNION
and
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Cuyahoga Valley Railway Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on November 20, 1984, in consolidated Cases No. 82-3771 and No. 82-3773, in which the Court of Appeals affirmed the October 29, 1982 decision of the Occupational Safety and Health Review Commission.

OPINIONS BELOW

The Decision and Opinion of the Court of Appeals, entered on November 20, 1984, is reported at 748 F.2d 340 and appears in Petitioners's Appendix. The October 29, 1982 Decision of the Occupational Safety and Health Commission appears in Petitioner's Appendix. Additionally, the September 28, 1976 Order of Administrative Law Judge Erwin L. Stuller which was set aside by the Commission appears in Petitioner's Appendix.

JURISDICTION

The opinion below was entered on November 20, 1984. Petitioner's timely Petition for Rehearing with a Suggestion for Rehearing *En Banc* was denied by the United States Court of Appeals for the Sixth Circuit on January 15, 1985.

Respondent Secretary of Labor's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Court of Appeals on March 1, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 10(c) of the Occupational Safety and Health Act of 1970 provides as follows:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection. 29 U.S.C. § 659(c).

STATEMENT OF THE CASE

On February 27, 1976 the Occupational Safety and Health Administration (hereinafter "OSHA") issued a citation alleging that the Cuyahoga Valley Railway Company (hereinafter "Cuyahoga Valley Railway") violated Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, *et seq*. (hereinafter the "Act"). Cuyahoga Valley Railway filed its notice to contest the citation and a complaint was filed by the Secretary of Labor (hereinafter the "Secretary"). The United Transportation Union (hereinafter the "Union"), the authorized representative of Cuyahoga Valley Railway's employees, elected to participate pursuant to 29 U.S.C § 659(c).

The matter was set for a calendar call on August 24, 1976 before Administrative Law Judge Erwin L. Stuller. At that time, the Secretary moved to withdraw the citation due to lack of jurisdiction over the cited working condition. The Secretary had determined that the cited condition was exempt from the Act's coverage as it was covered under the jurisdiction of the Federal Railroad Administration. The Union objected to the withdrawal of the citation and asked leave to submit support for its objection. Judge Stuller granted the request. When he had received no brief in support from the Union for over thirty days, Judge Stuller then issued his September 28, 1976 Order vacating the citation.

Although no party to this action filed a Petition for Discretionary Review, review was directed by Commissioners Moran and Cleary of the Occupational Safety and

Health Review Commission (hereinafter the "Commission"). On October 29, 1982, the Commission set aside Judge Stuller's order and remanded the case back to the Chief Administrative Law Judge to consider the Union's objections to the withdrawal of the citation.

On December 2, 1982, Cuyahoga Valley Railway filed a timely Petition for Review of the Commission's decision with the United States Court of Appeals for the Sixth Circuit, pursuant to 29 U.S.C. § 660(a). On or about the same day, the Secretary also filed a Petition for Review with the Court of Appeals.

The two petitions were consolidated and a panel of the Court of Appeals for the Sixth Circuit reviewed the Commission's decision and entered its judgment on November 20, 1984, affirming the Commission's remand of the case for consideration of the Union's objections to the withdrawal of the citation. Both Cuyahoga Valley Railway and the Secretary filed petitions for rehearing *en banc* which were denied, the former's by order of January 15, 1985 and the latter's by order of March 1, 1985.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ON THE ROLE OF THE SECRETARY OF LABOR AS EXCLUSIVE PROSECUTOR

The Court of Appeals decision stands alone in refusing the Secretary the authority to unilaterally withdraw a citation. Every United States Court of Appeals which has considered the question of the Secretary's role in enforcing the Act has endorsed a broad reading of the Secretary's author-

ity. These courts have recognized that employees or their authorized representatives may not prosecute a citation after the Secretary has declined to do so. *Donovan v. Local 962, International Chemical Workers Union (Englehard)*, 748 F.2d 1470, 1473 (11th Cir. 1984); *Donovan v. International Union, Allied Industrial Workers (Whirlpool)*, 722 F.2d 1415, 1422 (8th Cir. 1983); *Donovan v. United Steelworkers of America (Monsanto)*, 722 F.2d 1158, 1160 (4th Cir. 1983); *Donovan v. Oil, Chemical and Atomic Workers International (American Petrofina)*, 718 F.2d 1341, 1352-1353 (5th Cir. 1983), *cert. den.*, 104 S. Ct. 2344 (1984); *Donovan v. Occupational Safety and Health Review Commission (Mobil Oil), 713 F.2d 918, 926-927 (2d Cir. 1983); Oil, Chemical and Atomic Workers International v. Occupational Safety and Health Review Commission (American Cyanamid)*, 671 F.2d 643, 650-651 (D.C. Cir.), *cert. den.*, 459 U.S. 905 (1982); *Marshall v. Occupational Safety and Health Review Commission (IMC Chemical)*, 635 F.2d 544, 551 (6th Cir. 1980); *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1187 (3d Cir.), *cert. den.*, 449 U.S. 1061 (1980). These eight decisions of eight different United States Courts of Appeals have affirmed that the Secretary is the exclusive prosecutor of violations of the Act. In each instance, regardless of the rights of employees found by the court, the court clearly stated that a citation could not be prosecuted, regardless of the stage of the proceeding, absent prosecution by the Secretary.

In the instant case, the Court of Appeals attempted to distinguish its own precedent in *IMC Chemical*. *Cuyahoga Valley Railway Company v. Secretary of Labor*, 748 F.2d 340, 343; Appendix 2a, 7a (6th Cir. 1984). In *IMC Chemical*, the Court of Appeals for the Sixth Circuit held that the Secretary has the right to withdraw a contested citation over the objections of the employee representative. 635 F.2d at 650-51. Although the Secretary had not filed a complaint against IMC Chemical, a notice of contest had

been filed, giving the Commission jurisdiction under § 10(c) of the Act, 29 U.S.C. § 659(c). 635 F.2d at 546. The Court below said the instant case was distinquishable because a complaint had been filed. The Court thus relied on a distinction without a difference.

The Commission itself now holds that employees may not object to the Secretary's withdrawal of a citation. *American Bakeries Co.*, Empl. Safety & Health Guide paragraph 26,951 (1984) (Appendix 23a); *Copperweld Steel Co.*, Empl. Safety & Health Guide paragraph 26,956 (1984) (Appendix 31a). In both cases, the Commission held that a union may not object to the Secretary's motion to withdraw a citation. Moreover, in both *American Bakeries* and *Copperweld*, the motion to withdraw occurred subsequent to the filing of a complaint by the Secretary. Indeed, in *Copperweld*, a hearing before an Administrative Law Judge was held prior to the Secretary's withdrawal of the citation. Accordingly, the Commission today does not recognize the distinction made by the Court below.

In *American Cyanamid, supra*, the Court of Appeals for the District of Columbia went further. In that case, the Court stated the Secretary's refusal to prosecute a citation *upon remand* would moot an appeal of a Commission decision to a Court of Appeals by a union. 671 F.2d at 650-651.

Thus, the decision of the Court of Appeals in the instant case stands alone in allowing an employee representative to force continued prosecution by the Secretary. As a result, uniformity is lost in the nationwide administration and enforcement of the Act and the Secretary is hamstrung in his ability to effectively manage his enforcement of the Act.

II. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ON THE ROLE OF EMPLOYEES OR THEIR REPRESENTATIVES IN THE ENFORCEMENT OF CITATIONS

The Court of Appeals found that § 10(c) of the Act does not limit employees or their representatives to challenging only the reasonableness of the abatement period. The Court adopted the Commission's *former* interpretation of § 10(c) of the Act set forth in *Mobil Oil Corporation*, 10 OSHC (BNA) 1905, 1982 OSHD (CCH) paragraph 26,187, *rev.*, 713 F.2d 918 (2d Cir. 1983). That position is supported by the Court of Appeals for the Eighth, Fifth and District of Columbia Circuits. *Whirlpool, supra*, 722 F.2d at 1421; *American Petrofina, supra*, 718 F.2d at 1347-1351; *American Cyanamid, supra*, 671 F.2d at 646-649.

In *Mobil Oil*, the Commission held that the interests of an authorized employee representative who has elected party status in a timely manner, are not restricted to the specific abatement period. 10 OSHC (BNA) at 1915. The Court below gave "great deference" to the Commission's position as the Commission is the responsible agency. However, the Commission has now overruled *Mobil Oil* and concluded that employees may object only to the reasonableness of the abatement period. *Pan American World Airways*, Empl. Safety & Health Guide (CCH) paragraph 26,920 (1984) (Appendix 36a). Thus, the Court of Appeals adopted a position no longer held by the Commission.

Further, the interpretation by the Court of Appeals is contrary to that of the Courts of Appeals for the Eleventh, Fourth, Second and Third Circuits, *Englehard, supra*, 748 F.2d at 1473; *Monsanto, supra*, 722 F.2d at 1160; *Mobil Oil, supra*, 713 F.2d at 926; *Sun Petroleum, supra*, 622

F.2d at 1186. These Courts of Appeals interpret § 10(c) as affording employees the limited role in citation enforcement of contesting only the reasonableness of the abatement period. Thus, there is a clear conflict among the circuits as to the role authorized by the Act for employees or their representatives.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID J. MILLSTONE
Counsel of Record
THOMAS H. BARNARD
RICHARD T. PRASSE

SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Petitioner
Cuyahoga Valley
Railway Company

APPENDIX

APPENDIX A1

CUYAHOGA VALLEY RAILWAY COMPANY, *Petitioner*, v. SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., *Respondents*

No. 82-3773

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Slip Opinion

January 15, 1985

APPEAL-STATEMENT:
No Appeal Statement

OPINION:
BEFORE: MARTIN and JONES, Circuit Judges, and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc from the petitioner, Cuyahoga Valley Railway Company, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 82-3771/3773

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND J. DONOVAN, SECRETARY OF LABOR (82-3771),

and

CUYAHOGA VALLEY RAILWAY COMPANY (82-3773),

Petitioners,

v.

UNITED TRANSPORTATION UNION and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION to Review a Decision of the Occupational Safety and Health Review Commission.

Decided and Filed November 20, 1984

Before: MARTIN and JONES, Circuit Judges; and PECK, Senior Circuit Judge.

JONES, Circuit Judge. This is an appeal from a decision of the Occupational Safety and Health Review Commission (Commission) which set aside a 1976 Decision and Order of Administrative Law Judge Erwin L. Stuller (the ALJ). We affirm.

I.

The facts of this case are undisputed. On February 27, 1976, the Occupational Safety and Health Administration (OSHA) issued a citation alleging that the Cuyahoga Valley Railway Company (Cuyahoga) violated Section 5(a)(1) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 654(a)(1) (The "General Duty Clause") by failing to provide instructions and failing to enforce the rules governing the coupling and/or uncoupling of ingot buggy cars with tools. The citation also stated that Cuyahoga failed to insure that an adequate clearance was maintained between ingot buggy stools to permit employees to work safely between the buggies. Cuyahoga filed a Notice of Contest to the Citation on March 22, 1976.

On April 13, 1976, the Secretary of Labor (Secretary) filed a formal complaint against Cuyahoga. On April 19, 1976, the Union filed a motion and was granted leave to intervene and elect party status. On May 13, 1976, Cuyahoga filed its answer to the Secretary's complaint and it filed an amended answer on May 18, 1976. A hearing was scheduled for August 24, 1976 before the ALJ.

At the hearing, the Secretary moved to vacate the citation due to lack of jurisdiction over the cited condition. The Secretary believed that the Federal Railway Administration (FRA) had jurisdiction pursuant to 49 C.F.R. Part 217. Consequently, he felt OSHA should give way to the FRA's jurisdiction pursuant to Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1).

The Union objected to the Secretary's claim that he lacked jurisdiction and asserted that the working condition was not covered by the FRA. The ALJ took the case under advisement and stated that a written statement of the Union would be made part of the record. The ALJ did not, however, specify any time requirement as to when the Union should have its objections filed.

On September 1, 1976, an attorney representing the Union wrote to the ALJ informing him that "unless advised to the contrary," the Union would file its brief "at the earliest possible date." The ALJ vacated the Secretary's citation on September 28, 1976 without any further notification to the parties and without considering the Union's objections which were set forth in its brief that the ALJ received on September 29, 1976.

Cuyahoga contends that Rule 37 of the Commission's Rules of Procedure provides a ten-day time limit for filing objections, that the Union failed to meet that time limit, and that the ALJ properly issued its decision on September 28, 1976 without further notification to the parties because some thirty-five days had elapsed since the hearing.

Although no party to this action filed a Petition for Discretionary Review, Commissioners Moran and Cleary directed review in October, 1976. Commissioner Moran's direction did not state a specific issue, but Commissioner Cleary directed review of the following question:

> Whether the Administrative Law Judge erred in vacating the citation and notification of proposed penalty based on the Secretary's determination that pursuant to Section 4(b)(1) of the Act the Secretary did not have authority to issue the citation?

On October 29, 1982, the Commission issued its decision setting aside the ALJ's order and remanded the case to the Chief Administrative Law Judge to consider the Union's objections to the Secretary's motion to vacate the citation. The Commission held that the ALJ had erred by ruling on the Secretary's motion "without receiving the Union's brief and considering the merits of its objections."

In reaching its decision, the Commission expressly relied upon its decision in *Mobil Oil Corp.*, 10 OSHRC (BNA) 1905, CCH OSHD ¶ 26,187 (1982). Subsequently, the hearing set

by the Chief Administrative Law Judge to consider the Union's objections was stayed by the Commission pending the outcome of these proceedings.

The issues presented by this appeal, are, (1) whether the Act permits the Commission to review the Secretary's withdrawal of a citation, (2) whether the Act permits employees or their authorized representatives, who have elected party status, to object to the withdrawal of a citation once the Secretary has filed a formal complaint and there has been an employer contest, and (3) whether the Union waived any right it may have had to object to the citation by failing to submit their objections in a timely manner.

II.

Our review of the Commissioner's findings of fact is governed by 29 U.S.C. § 660(a), which provides:

> The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

The standard of judicial review of legal issues is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *Donovan* v. *Anheuser-Busch, Inc.*, 666 F.2d 315 (8th Cir. 1981). This Court has held that adjudicatory conclusions of the Commission may be set aside when they are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Empire-Detroit Steel Division, Detroit Steel Corp.* v. *OSHRC*, 579 F.2d 378 (6th Cir. 1978).

A. THE COMMISSION'S AUTHORITY TO REVIEW THE SECRETARY'S WITHDRAWAL OF THE CITATION

The first issue that must be resolved in this case is whether the Commission had the authority to vacate the decision of the ALJ and remand the matter to the Chief Administrative Law Judge for further proceedings. Petitioners argue that

the Secretary, as the sole prosecutor of the Act, has the power to withdraw a citation as he sees fit. Accordingly, they argue that the Commission lacks the authority to require the Chief Administrative Law Judge to consider the merits of this case. The resolution of this issue depends upon the interpretation given to this Court's decision in *Marshall* v. *OSHRC*, 635 F.2d 544 (6th Cir. 1980).

In *Marshall* the Secretary issued a citation against IMC Chemical Group, Inc. (IMC) for alleged OSHA violations. IMC filed a notice of contest. The matter was then referred to the Solicitor of Labor to prepare a complaint for filing with the Commission. The Solicitor determined that IMC had not created a hazard to its employees and that a complaint should not be filed. The Secretary agreed with the Solicitor that the citation was not warranted, *decided not to file a complaint*, and filed a motion with the Commission to vacate the citation. The union representing the IMC employees wrote a letter objecting to the withdrawal of the citation. The Administrative Law Judge granted the motion of the Secretary to vacate the citation, holding that the Secretary had the absolute and unconditional right to vacate a citation *prior to the filing of a complaint and answer*. The Commission subsequently vacated the decision of the Administrative Law Judge and remanded the matter to him for further proceedings, holding that the affected employees or their union could proceed to prosecute the citation originally issued by the Secretary if they elected party status.

On petition for review of the Commission's decision, this Court held:

> [T]he Act, by its terms, makes the Secretary the exclusive prosecutor of OSHA violations. It follows that, *prior to the filing of a complaint and answer, the Secretary has* the right to withdraw a contested citation.

635 F.2d at 550 (emphasis added). While this court noted that the Secretary is the exclusive prosecutor of OSHA violations, we also acknowledged the fact that the Commission is the body that *adjudicates* disputes arising under the Act. *See also*, 29 U.S.C. § 651(b)(3).

The key issue in the case at bar is whether the Secretary has an absolute right to withdraw a citation *subsequent* to the filing of a complaint and answer. The Union contends that in a case such as this, in which a formal complaint and answer are filed with the Commission prior to the Secretary's attempt to withdraw the citation, the Secretary's role as prosecutor becomes much more limited, and the Commission's role as the adjudicative body takes over. We agree. This Court's holding in *Marshall* was specifically limited to cases in which a formal complaint and answer had not yet been filed. In formulating the issue in *Marshall* this Court stated:

> (4) *Prior to the filing of a complaint and answer*, can the Commission refuse to permit the Secretary to withdraw a contested citation over the objection of a Union representing affected employees?

635 F.2d at 546 (emphasis added). In answering this question this Court again specifically held that "*prior to the filing of a complaint and answer*, the Secretary has the right to withdraw a contested citation." 635 F.2d at 550 (emphasis added). If we adopt respondent's argument that the holding in *Marshall* controls the case at bar, we would have to ignore a factor that this Court considered significant in *Marshall*, i.e., that no complaint or answer had been filed. In essence, *Marhsall* held that the *Secretary* has the sole authority to determine whether to prosecute. In the case at bar, the Secretary had already made the decision to prosecute by filing a complaint and that complaint had been answered at the time the Secretary attempted to withdraw the citaion. The adversarial process was well-advanced at the time the Secretary attempted to withdraw the citation. The Commission, therefore, as the adjudicative body, had control of the case and the authority to review the Secretary's withdrawal of the citation.

B. THE UNION'S AUTHORITY TO OBJECT TO THE WITHDRAWAL OF THE CITATION.

Although the Commission had the authority to review the Secretary's withdrawal of the citation, it does not follow necessarily that the Union also had the right under the Act to object to its withdrawal. The resolution of whether the Union had authority to object to the withdrawal of the citation turns upon the interpretation given to Section 10(c) of the Act, 29 U.S.C. § 659(c). Section 10(c) provides:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a) (3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. *The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.*

(emphasis added). Rule 20(a) of the Commission's Rules of Procedure was adopted pursuant to the mandate stated in the last sentence of Section 10(c). It provides:

> Affected employees may elect to participate as parties at any time before the commencement of the hearing before the Judge, unless, for good cause shown, the Commission or the Judge allows such election at a later time.

The key issue here is whether the Union, having elected party status, can fully participate in this litigation or whether an employee representative is limited to challenging the reasonableness of an abatement period. Section 10(c) provides for two kinds of proceedings. First, an employer may initiate a proceeding by filing a notice of contest to a citation. Second, employees may commence a proceeding to contest the period set in a citation for abatement of a violation. The dispute in this case concerns the extent of employee participation in employer-initiated proceedings once the employee representative has been afforded an opportunity to elect a party status. The Secretary contends that employee participation is limited to challenging the reasonableness of the period for abatement of the violation in both kinds of proceedings. The Union and the Commission read the statute as providing for plenary participation by employees in employer-initiated proceedings, but concede that in employee-initiated proceedings, the union may only object to the reasonableness of the abatement period.

In *Mobil Oil Corp.*, 10 OSHRC (BNA) 1905, CCH OSHD ¶ 26,187 (1982), the Commission held that an authorized employee representative, who has elected party status in a timely manner, is not restricted to contesting the reasonableness of the abatement period, but has the full rights that any party to a lawsuit would have. This case, however, was reversed recently by the Second Circuit in *Donovan* v. *OSHRC*, 713 F.2d 918 (2d Cir. 1983) (*Donovan*). The Second Circuit adopted the interpretation of Section 10(c) which the Secretary espouses in this case, i.e. that employees may contest only the abatement

period set by the Secretary. The Third and Fourth Circuits have taken similar positions. *Donovan* v. *United Steelworkers*, 722 F.2d 1158 (4th Cir. 1983); *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176, 1185-88 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980) (*Sun Petroleum*) and this Court's decision in *Marshall* might appear to be consistent with the Second and Third Circuits.

As stated before, however, *Marshall* dealt with the prosecutorial authority vested in the Secretary which is almost unlimited. It did not address the issue presented by this case, i.e., what Union rights arise at the adjudicatory stage, the administration of which falls within the Commission's baliwick. Since *Marshall* does not address employee rights once the adjudicatory process is fully in place, it does not control the case at bar. We hold that under Section 10(c) the Union has full rights, as parties, to contest tthe withdrawal of this citation. This interpretation of Section 10(c) is consistent with the Fifth, Eighth, and District of Columbia Circuits. *See Donovan* v. *International Union, Allied Industrial Workers*, 722 F.2d 1415 (8th Cir. 1983); *Donovan* v. *Oil Chemical and Atomic Workers International Union*, 718 F.2d 1341 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984) (*Atomic Workers International*); *Oil, Chemical & Atomic Workers* v. *OSHRC*, 671 F.2d 643 (D.C. Cir.), *cert. denied*, 456 U.S. 969 (1982).

The Second, Third, and Fourth Circuits, which have adopted the more restrictive interpretation of section 10(c), support their positions by citing a portion of the Senate Commitee Report, which states that Section 10(c) "'gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation . . . is unreasonably long, *to challenge the citation on that ground.*'" *Sun Petroleum*, 622 F.2d at 1186. The District of Columbia Circuit, on the other hand, which gave Section 10(c) a more liberal reading, quoted the aforestated legislative history in a more accurate context:

> *If the employer decides to contest* a citation or notification or proposed assessment of penalty, the Secretary must afford an opportunity for a formal hearing under the Administrative Procedure Act. Based upon the hearing record the Secretary shall issue an order confirming, denying, or modifying the citation, notification, or proposed penalty assessment. The procedural rules prescribed by the Secretary for the conduct of such hearings must make provision for affected employees or other representatives *to participate as parties.*
>
> Section 10(c) *also* gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground. Such challenges must be filed within 15 days of the issuance of the citation and an opportunity for a hearing must be provided in similar fashion to hearings when an employer contests. The employer is to be given an opportunity to participate as a party. *Id.* (Emphasis added).

Oil, Chemical & Atomic Workers v. *OSHRC*, 671 F.2d at 648. The Fifth Circuit expressly adopted the interpretation of the District of Columbia Circuit in determining whether Section 10(c) permits employees to challenge the terms of a settlement agreement between the Secretary and the employer has withdrawn its contest to the citation. *Atomic Workers International*, 718 F.2d at 1349. The Fifth Circuit reasoned:

> The word "parties" usually connotes persons entitled to participate fully in litigation. This view is buttressed by the more complete account of the legislative history quoted by the District of Columbia Circuit, which suggests that Congress contemplated two different applications of the "parties" provision. The ultimate sentence of § 10(c) instructs the Commission to provide for employee participation "as parties *to hearings under this*

> *subsection.*" The subsection, as we have seen, plainly envisions two kinds of hearings—employee-initiated and employer-initiated—and it contains no language limiting the employee's participation in the employer-initiated hearings to debate over the reasonableness of the abatement period.

Id. (emphasis in original). We adopt the interpretation of the Fifth and District of Columbia Circuits. Not only does the statutory language of Section 10(c) support this interpretation, the Commission itself espouses this interpretation. *Donovan*, 713 F.2d at 1348.

Interpretations of the statute by the Commission should be treated with deference and should not be overturned if reasonable and consistent with the purposes of this chapter. *Electric Smith, Inc.* v. *Secretary of Labor*, 666 F.2d 1267, 1270 (9th Cir. 1982). Furthermore, this Court has held that administrative interpretation of an agency's own regulations must be given great deference by a reviewing court. *Concrete Construction Co., Inc.* v. *OSHRC*, 598 F.2d 1031, 1032 (6th Cir. 1979). This Court has also held that where the Secretary and the Commission differ over the construction of this chapter, the Commission's construction is entitled to great deference. *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978). While there is concededly a dispute among the circuits with respect to the proper interpretation of Section 10(c) the Commission's adjudicatory conclusion is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Empire-Detroit Steel Division* v. *OSHRC*, 579 F.2d at 378. Accordingly, we adopt it.

C. THE UNION'S RIGHT TO OBJECT TO THE SECRETARY'S MOTION TO WITHDRAW THE CITATION.

The final issue presented by this appeal is whether the Union waived its right to object to the Secretary's motion to

withdraw the citation by failing to object in a timely manner. The resolution of this issue depends on whether Rule 37 or Rule 76 of the OSHRC Rules of Procedure applies. Rule 37 provides for a ten-day limit for filing objections. If Rule 37 applies the Union has waived its right to object because it did not file its brief within ten days of the hearing. Rule 76, on the other hand, gives the Union twenty days from the date it received a transcript of the hearing in which to file its brief. Thus, if Rule 76 applies, the Union filed its brief in a timely manner. Rule 76 provides:

> Any *party* shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, *to file a brief*, proposed findings of fact and conclusions of law, or both, with the Judge. The Judge may fix a reasonable period of time for such filing, but such initial period *may not exceed 20 days from the receipt by the party of the transcript of the hearing.*

(emphasis added).

In addition to the text of Rule 76, the Union received a letter from the attorney for the Secretary of Labor on October 20, 1976 stating:

> Dear Mr. Huhn:
>
> Enclosed please find a copy of the transcript of the August 24, 1976 hearing . . .
>
> Please be advised this transcript was not forwarded to the judge until September 14, 1976.
>
> *Commission Rule 76* provides that the parties have 20 days after receipt of the transcript to file post-trial briefs. Assuming Judge Stuller received the transcript on September 16, 1976, which is highly unlikely due to the cur-

rent pace of the mails *you had until October 5, 1976 in which to file your brief*. If you require an affidavit of the court reporter as to the date the transcript was forwarded to the Judge, please advise.

Sincerely,

W.S. Kleopfer
Associate Regional Solicitor

By William E. Curphey, III
Trial Attorney

(Emphasis added).

We hold that Rule 76 applies to this case. Both the language of the rule and the foregoing letter indicate that it applies here. Rule 37, on the other hand, simply applies to responses to motions.

For the foregoing reasons we uphold the decision of the Commission and remand this case to the Chief Administrative Law Judge for further proceedings.

APPENDIX A3

UNITED STATES OF AMERICA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, *Complainant*, v. CUYAHOGA VALLEY RAILWAY COMPANY, *Respondent*, UNITED TRANSPORTATION UNION, *Authorized Employee Representative*.	OSHRC Docket No. 76-1188

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This is a case under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). An order of Judge Erwin Stuller is before the Commission for review under section 12(j) of the Act, 29 U.S.C. § 661(i). Judge Stuller, at the request of the Secretary, vacated a citation issued to Cuyahoga. We reverse and remand for additional proceedings.

I

Cuyahoga, which operates a railroad for Jones and Laughlin Steel Corporation, was inspected by an official of the Occupational Safety and Health Administration ("OSHA"). As a result of the inspection, Cuyahoga was

cited for a serious violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1). According to the citation, Cuyahoga had failed to adequately instruct and enforce its rules concerning the coupling and uncoupling of its ingot buggy cars. Respondent had also allegedly failed to maintain adequate clearance between buggy cars.[1]

At a calendar call hearing on August 24, 1976, the Secretary moved to vacate the citation. The Secretary claimed that the cited working condition was exempt from the Act's coverage due to section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1).[2] The Secretary asserted that the Federal Railway Administration ("FRA") had exercised authority over the cited working condition, pointing to 49 C.F.R.

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[1] A description of the alleged violation contained in the citation states:

> On and prior to January 14, 1976, the employer failed to furnish his employees working in the area of the BOF Department, a place of employment which was free from a recognized hazard that was likely to cause death or serious harm to his employees in that the employer failed to:
>
> (A) Adequately instruct and enforce rules when employees are required to couple and/or uncouple ingot buggy cars with stools; or
>
> (B) Maintain an adequate clearance between ingot buggy stools to permit employees to perform their duties safely when it requires them to place themselves between two buggies.

[2] Section 4(b)(1) provides, in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

§§ 217.1 and 217.3(a).[3] A member of the United Transportation Union ("the Union") appeared at the hearing and objected to the Secretary's motion. The Union, which represents employees affected by the alleged violation, claimed that OSHA authority over the cited working condition was not preempted because Cuyahoga's operation of an intraplant railroad is not covered by regulations of the FRA. Specifically, the Union pointed to 49 C.F.R. § 217.3(b)(1), which says that the FRA's regulations in 49 C.F.R. § 217 do not apply to "[a] railroad that operates only on track inside an installation which is not part of the general railroad system of transportation."

Judge Stuller took the matter under advisement and instructed the Union to submit "something in writing." He did not specify any time to the instruction. On September 1, 1976, an attorney representing the Union wrote to the judge, recounting the proceedings at the calendar call and informing the judge that, "unless advised to the contrary" the Union would file a brief "at the earliest possible date." On September 28, 1976, Judge Stuller entered an order vacating the citation. Judge Stuller had not given further notice to the parties nor had he received the Union's brief.

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[3] These sections provide:

> § 217.1 *Purpose*.
>
> Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.
>
> § 217.3 *Application*.
>
> (a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation.

The judge simply recited the Secretary's concession that the FRA had authority and noted that he had not received the Union's brief. The Union submitted its brief on September 29, 1976.

Commissioner Cleary directed that the judge's order be reviewed[4] on the following question:

> Whether the administrative law judge erred in vacating the citation and notification of proposed penalty based on the Secretary's determination that pursuant to section 4(b)(1) of the Act the Secretary did not have authority to issue the citation?

II

Cuyahoga argues that the FRA has authority over the matter and not OSHA. Cuyahoga asserts that while part of its operation is an intraplant railroad, it also serves as a common carrier with switching operations for other customers outside the Jones and Laughlin Steel plant. Therefore, Cuyahoga is not an entirely intraplant railroad and does not come under the section 217.3(b)(1) limitation. Cuyahoga argues that OSHA jurisdiction is preempted under section 4(b)(1) because the FRA has statutory authority over the cited working conditions.

Cuyahoga also challenges the Union's right to object to the Secretary's motion to dismiss the case. Cuyahoga claims the Union only has party status to object to the reasonablenesss of the abatement period, relying on *UAW Local 588 (Ford Motor Co.)*, 76 OSAHRC 58/B8, 4 BNA OSHC 1243, 1976-77 CCH OSHD ¶ 20,737 (No. 2786, 1976) *("UAW")*, *aff'd*, 557 F.2d 607 (7th Cir. 1977).

The Secretary agrees with Cuyahoga that an authorized employee representative has no right to object to the

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[4] Former Commissioner Moran also directed review "for error."

Secretary's decision to withdraw a citation. The Secretary also asserts that, on the evidence available, he has determined that a section 4(b)(1) exemption exists for all of the citation except those parts which allege that Cuyahoga failed to enforce coupling and uncoupling rules and failed to maintain an adequate safe clearance between ingot buggy stools. These aspects of Cuyahoga's operations were not covered by FRA regulations but rather Cuyahoga's operating rules. The Secretary states, ". . . that an employer's formulation of rules pursuant to requirements of an agency does not constitute an exercise of statutory authority by an agency under section 4(b)(1)." However, the Secretary states that he also determined that no useful purpose "with respect to employee safety or the proper allocation of the Secretary's resources would be served by litigation of these additional allegations."

III

The Commission recently overruled UAW and held that the interests of an authorized employee representative that has elected party status in a timely manner are not restricted to the reasonableness of the abatement period. *Mobil Oil Corp.*, 82 OSAHRC , 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982). The Union, as a party in the case, may object to the Secretary's motion to withdraw the citation. *See Mobil Oil Corp., supra*. Although Judge Stuller properly heard the Union's objections to the Secretary's motion to withdraw, he erred in ruling on the motion without receiving the Union's brief and considering the merits of its objection.[5]

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[5] Chairman Rowland adheres to his position in *Mobil Oil Corp., supra* (dissenting opinion). The Chairman believes that the decision to withdraw a citation is within the prosecutorial discretion of the Secretary and therefore he would affirm Judge Stuller's decision.

Accordingly, we set aside the judge's order and remand the case to the chief administrative law judge[6] to consider the Union's objections to the withdrawal of the citation.[7]

SO ORDERED.

FOR THE COMMISSION

RAY H. DARLING, JR.
Ray H. Darling, Jr.
Executive Secretary

Dated: October 29, 1982

[6] Judge Stuller has retired.

[7] Commissioner Cottine presumes that the Secretary will proceed appropriately on the merits if the Union's objections are found to be meritorious and the withdrawal motion is denied. *See Dunlop v. Bachowski*, 421 U. S. 560, 574-76 (1975).

CLEARY, Commissioner, concurring:

I concur in remanding this case for consideration of the Union's objection to the Secretary's withdrawal of the citation. As the Commission has stated: "The Secretary cannot be permitted to exercise prosecutorial discretion in a manner that would interfere with the right of affected employees to be heard as parties protecting their interest. *IMC Chemical Group*, 78 OSAHRC 95/C14, 6 BNA OSHC 2075, 2077, 1978 CCH OSHD ¶ 23,149 at p. 27,990 (No. 76-4761, 1978), *rev'd*, 635 F.2d 544 (6th Cir. 1980). If the Secretary chooses not to prosecute a citation in a case in which employees or their authorized representative have elected party status, the citation may be prosecuted by the employee party. *Id.; see Mobil Oil Corp.*, 82 OSAHRC , 10 BNA OSHC 1905, 1927-28, 1982 CCH OSHD ¶ 26,187 at p. 33,041 (No. 77-4386, 1982) (concurring opinion).

Although the lead opinion does not refer to the Commission's decision in *IMC Chemical Group*, that decision remains Commission precedent and the judge is obliged to follow it on remand. *Grossman Steel & Aluminum Corp.*, 76 OSAHRC 56/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1975). Thus, the judge should grant the Secretary's motion to withdraw the citation only if he concludes that the Union's objections are without merit as a matter of law. If he finds merit in the objections, he should deny the Secretary's motion and schedule the case for a hearing. If the Secretary declines to appear at the hearing to prosecute the citation, the judge should permit the Union to prosecute if it chooses to do so.

APPENDIX A4

UNITED STATES OF AMERICA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, *Complainant*, v. CUYAHOGA VALLEY RAILWAY COMPANY, *Respondent*.	**Docket No. 76-1188**

ORDER

At the calendar call of the above case in Cleveland, Ohio, on August 24, 1976, the parties appeared and indicated that they had a basis for disposing of the case.

Complainant's counsel stated that he has determined that the regulation of the Department of Transportation, Federal Railroad Administration fits the description of the violation alleged herein and therefore pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1)) the complainant was without authority in issuing the citation in question.

The representative of the affected employees then asked leave to file a legal brief contesting the complainant's position. That brief has not been received. Based on the foregoing the citation and notification of proposed penalty herein are VACATED.

ERWIN L. STULLER
Erwin L. Stuller
Judge

Dated: September 28, 1976

APPENDIX A5

For further action, if any, see Case Table ¶ 7995.

[¶ 26,951] American Bakeries Company

Text of Review Commission's decision dated June 28, 1984. Docket No. 83-131. The Judge's decision appears at 1983-1984 OSHD ¶ 26,599.

Employee participation — Citation Withdrawal — Employee Right to Object — Effect of Party Status — Service. A motion to withdraw a citation need not be posted or served on unions and employees who have not elected party status because even unions and employees with party status have no right to object to a withdrawal motion. Where unions or effected employees are parties, Commission Rule 7(a) continues to require that they be served with all filed papers, and service of a citation withdrawal affords them notice that the proceeding is being terminated, but there is no purpose in providing such notice to those who have not sought to participate. The Commission decision in *Republic Steel Corp.* (1982 OSHD ¶ 26,326) that a union may object to a motion to withdraw a citation was overruled, in accord with appellate decisions in four circuits. Commission precedent on employee participation was reexamined in *Pan American World Airways* (1984 OSHD ¶ 26,920) and participation limited to the reasonableness of the abatement date.

Back references: ¶ 4547; 4606.

Christopher Lovell for the employer. Daniel J. Mick for the Secretary.

[Text of Review Commission's Decision]

Before: Rowland, Chairman; CLEARY and BUCKLEY, Commissioners.

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U. S. C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678 ("the Act"). The Commission is an adjudicatory agency, independent of the Department of Labor and the Occupational Safety and Health Administration. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the Act and has no regulatory functions. See section 10(c) of the Act, 29 U. S. C. § 659(c).

The question for decision is whether a motion by the Secretary of Labor to withdraw a citation shall be served upon authorized employee representatives of affected employees or posted for unrepresented affected employees if the representatives or employees have not elected party status.

The Secretary of Labor issued a citation to American Bakeries Company. American Bakeries filed a notice of contest, which was transmitted to the Commission. In accordance with Commission Rule 7(h), 29 C. F. R. § 2200.7(h),[1] American Bakeries certified that it had served the notice of contest upon the affected employees' representative, Local Union No. 50 of the International Brotherhood of Teamsters. The Secretary later moved to withdraw the citation on the ground that insufficient evidence

[1] Commission Rule 7(h) states:
Service and notice.

* * *

"(h) The authorized employee representative, if any, shall be served with the notice set forth in paragraph (g) of this section and with a copy of the notice of contest."

The notice set forth in Rule 7(g) informs employees of their right to participate as parties.

existed to support his case, but he did not certify that his motion was served upon the union local. Neither the union local nor any affected employee had elected party status.[2] Administrative Law Judge Salyers granted the withdrawal motion. The judge's decision was thereafter directed for review on the question stated above. We conclude that a motion to withdraw a citation need not be posted or served on unions and employees who have not elected party status.

In *Ceres Terminals, Inc.*, 83 OSAHRC 30/D8, 11 BNA OSHC 1373, 1983 CCH OSHD ¶ 25,510 (No. 82-713, 1983),[3] the Commission required that motions to withdraw citations be posted and served on unions that had not elected party status. The Commission reasoned that such action was "consistent with the principles stated in" its decision in *Mobil Oil Corp.*, 82 OSAHRC 45/A2, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982) (employees and unions may object to settlement agreement that does not provide for abatement), rev'd sub nom, *Donovan v. OSHRC (Mobil Oil Corp.)*, 713 F. 2d 918 (2d Cir. 1983). The Commission also relied on *Republic Steel Corp.*, 82 OSAHRC 67/E1, 10 BNA OSHC 2222, 1982 CCH OSHD ¶ 26,326 (No. 81-656, 1982), which held that a union-party may object to a motion to withdraw a citation.

[2] 29 U. S. C. § 659(c), section 10(c) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678, permits affected employees and unions to file a notice of contest as to the reasonableness of the abatement date in the citation. Commission Rule 20, 29 C. F. R. § 2200.20, also permits affected employees and unions to elect party status. See also Commission Rule 21, 29 C. F. R. § 2200.21.

[3] See also *Georgia Pacific Corp.*, 83 OSAHRC 30/E9, 11 BNA OSHC 1374, 1983 CCH OSHD ¶ 26,521 (No. 82-993, 1983); *National Railroad Passenger Corp.*, 83 OSAHRC 30/E2, 11 BNA OSHC 1375, 1983 CCH OSHD ¶ 26,511 (No. 82-785, 1983).

The decision in *Ceres Terminals* was designed to permit a union or affected employees to review the motion, elect party status, and present objections to the motion to an administrative law judge. Its unspoken premise was that unions or employees that have elected party status may object to a motion by the Secretary to withdraw a citation.

In *Pan American World Airways*, No. 83-249 (May 31, 1984), the Commission re-examined its precedent relating to employee participation in light of a number of appellate court decisions on this subject. *Pan Am* overruled *Mobile* and held that a union that has elected party status may object only to the reasonableness of the abatement date in a settlement. See also *Willamette Iron & Steel Co.*, No. 78-4198 (May 31, 1984) (union may not object to characterization of violation in settlement). In reaching this holding, we relied on numerous court decisions that had reviewed the respective roles of the Commission and the Secretary and had held or implied that a union-party may not object to the Secretary's withdrawal of a citation. See *Donovan v. OSHRC (Mobile Oil Corp.)*, 713 F. 2d 918, 926-7 (2d Cir. 1983), rev'g *Mobile Oil Corp.*, 82 OSAHRC 45/A2, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982); *Donovan v. International Union, Allied Industrial Workers (Whirlpool Corp.)*, 722 F. 2d 1415, 1419-21 (8th Cir. 1983); *Oil, Chemical & Atomic Workers International Union v. OSHRC (American Cyanamid Co.)*, 671 F.2d 643, 649-50 & n. 6 (D. C. Cir. 1982), cert. denied, 103 S. Ct. 206 (1983); *Marshall v. Sun Petroleum Products Co.*, 622 F. 2d 1176, 1187 (3d Cir.) cert. denied, 449 U. S. 1061 (1980); *Marshall v. OSHRC (IMC Chemical Group)*, 635 F. 2d 544, 551 (6th Cir. 1980). Inasmuch as we agree with these courts of appeals, we overrule *Republic Steel* and hold that a union-party may not object to a motion by the Secretary to withdraw a citation.

In view of this, it would serve little or no purpose to inform a union that is not a part of the motion to withdraw, for even if it were to elect party status it would have no right to object to the motion. We therefore hold that a motion to withdraw a citation need not be posted and served upon employees of unions who are not parties. *Ceres Terminals* and all other cases to the contrary are overruled.[4]

We emphasize that where unions or affected employees are parties, Commission Rule 7(a) continues to require that they be served with all filed papers. Service of a motion to withdraw a citation on employees and unions who are parties affords them notice that the proceeding is being terminated. There is, however, no need to provide such notice to those who have neither participated nor sought to participate in the proceeding.

Accordingly, the judge's decision is affirmed.

CLEARY, Commissioner, dissenting:

The facts of this case are that the Secretary cited American Bakeries Company for a violation of the Occupational Safety and Health Act and the employees and their bargaining representative were presumably notified of the citation as required by section 9(b) of the Act, 29 U. S. C. § 658(b). Subsequently, the employer filed a notice of contest, and again employees or their employee representa-

[4] This holding is consistent with the Commission's Rules of Procedure, which do not require service of motions to withdraw on those who are not parties. Commission Rule 7(a), 29 C. F. R. ¶ 2200.7(a), requires papers to be served only upon parties and intervenors. See also Commission Rule 37, 29 C. F. R. ¶ 2200.37 (affording parties and intervenors time to reply to motions). Commission Rule 100(c), 29 C. F. R. ¶ 2200.100(c), provides an exception to the general rule of Commission Rule 7(a), but because it applies only to settlements, it is not relevant here.

tives were presumably notified as required by Rule 7(g) of this Commission's rules of procedure. Finally, the Secretary determined that he no longer wished to prosecute this action, and filed a motion to withdraw the citation. Yet, this latter document has not been made known to the employees or their representatives even though the employees and their representatives have the right to become a party to this action. As employees, they would have an interest paramount above all others in determination of this case because they are the ones who would be affected by unsafe conditions.

I have always maintained that employees have the right, at a minimum, to object to the withdrawal of a citation.[5] They are in the best position to know if a violation exists, and are in a position to give evidence to a judge or to the Secretary, as any number of cases illustrates. See *e. g., Marshall v. Sun Petroleum, Products Co.*, 622 F. 2d 1176 (3d Cir.), cert. denied, 449 U. S. 1061 (1980); *Consolidated Freightways*, 81 OSAHRC 46/E9, 9 BNA OSHC 1822, 1981 CCH OSHD ¶ 25,369 (No. 79-3136, 1981); *Pènn Central Transportation Co. and Daniel Tarasevich*, 1976-77 CCH OSHD ¶ 20,832 (No. 11581, 1976) (ALJ). Indeed, if American Bakeries' employees had been informed that the Secretary wishes to no longer prosecute this citation, they may have exercised their right to become parties under section 10(c) of the Act, 29 U. S. C. § 659(c). The Commission's own rules afford them an unqualified right to do so at any time before a hearing commences. See

[5] See *Republic Steel Corp.*, 82 OSAHRC 67/E1, 10 BNA OSHC 2222, 1982, CCH OSHD ¶26,326 (No. 81-656, 1982); *Cuyahoga Valley Ry.*, 82 OSAHRC 59/C3, 10 BNA OSHC 2156, 1982 CCH OSHD ¶ 26,296 (No. 76-1188, 1982), pets, for rev. filed, Nos. 82-3771 & 82-3773 (6th Cir. Dec. 1 & 2, 1982).

Commission Rule 20(a). In view of the right of employees to become parties and the impact on employees of the outcome, a notification of withdrawal is more than a mere courtesy; it is a right.

This Commission, long ago, dealt with this exact question in *Pacific Intermountain Express Co.*, 74 OSAHRC 67/F10, 2 BNA OSHC 1228, 1974-75 CCH OSHD ¶ 18,718 (No. 4303, 1974). The Commission there said that "[w]here employers have moved to withdraw their notices of contest, we require that a copy and a motion be served on affected employees by posting." The requirement was imposed because favorable treatment of the motion would terminate the proceedings, and thus terminate the right of employees to participate under section 10(c). The majority then went on to say:

> We see no reason why the same requirement should not be imposed on complainant when he moves to withdraw before the commencement of a hearing. Complainant's status as a party before this Commission is co-equal with that of a party employer, and simple fairness requires that both be treated equally. In any event, the reason for service of the motion has equal application to both situations.

Circumstances have not changed since *Pacific Intermountain* was decided.

Even if I agreed, arguendo, that employees have no right to raise objections to a motion to withdraw a citation, I would still require posting and service for the benefit of affected employees and their representatives who have not yet become parties. The Secretary and the Commission are charged with serving the public interest in enforcement of health and safety rights. These are public, not private rights, and public rights should be pursued in public view.

For further action, if any, see Case Table ¶ 7995.

Employees have no private cause of action under the Occupational Safety and Health Act; they must rely on the Secretary to initiate action for their benefit. Therefore, the Commission should require the Secretary to apprise them as to whether, when, and how he has acted on their behalf.

This is more then a general principle of good government; it is a requirement of this Act. Section 6(e). 29 U. S. C. § 655(e), requires that the Secretary take all significant action in full public view: "Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the Federal Register." Section 9(b) provides that "[e]ach citation issued under this section . . . shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred." If employees have a right to see the citation, it surely follows that they have a concomitant right to know that the citation is being withdrawn. This principle is evinced elsewhere in the Act. Section 8(f)(1), 29 U. S. C. § 657(f)(1), requires the Secretary to notify employees and employee representatives in writing of his denial of their request for a special inspection. Similarly, section 8(f)(2), 29 U. S. C. § 657(f)(2), requires the Secretary to furnish employees and their representatives a written statement of the reasons for the Secretary's refusal to issue a citation with respect to conditions alleged by the employees or representatives, before or during an inspection, to violate the Act. Certainly, there is no less reason for notification of the Secretary's action in this case.

I would require that employees and their representatives by notified when a case is abandoned by the Secretary.

For further action, if any, see Case Table ¶ 7995.

[¶ 26,956] Copperweld Steel Co.

Text of Review Commission's decision dated June 29, 1984. OSHRC Docket No. 79-2600. The Judge's decision is at OSHD ¶24,499.

Employee Participation — Withdrawal of Citation — Secretary's Motion — Objection by Employee Representative. The Secretary's motion to withdraw a citation under review by the Commissioners was granted over the employee representative's argument that the citation should be affirmed because the evidence established the existence of a violation. The Review Commissioners, relying on a number of appellate court decisions, ruled in *American Bakeries* (1984 OSHD ¶ 26,951) that a union party may not object to a motion by the Secretary to withdraw a citation.

Back references: ¶ 4547; 4606.

R. Henry Moore for the employer. William S. Kloepfer for the Secretary. John R. Molovich and Robert Villa for the employees.

[Text of Review Commission's Decision]

Before: ROWLAND, Chairman; CLEARY and BUCKLEY, Commissioners.

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U. S. C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678 (the "Act"). The Commission is an adjudicatory agency, independent of the Department of Labor and the Occupational Safety and Health Administration. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the Act and has no regulatory functions. See section 10(c) of the Act, 29 U. S. C. § 659(c).

The Secretary of Labor issued a citation alleging that Copperweld Steel Company had violated the Act. An administrative law judge held a hearing, and thereafter vacated the citation on the ground that the Secretary had not proved that a violation occurred. The Secretary sought discretionary review, which was granted. He later moved to withdraw the citation, noting Copperweld's voluntary efforts and the difficulty of successfully prosecuting a failure-to-abate action, and stating that "the Secretary has determined that this case is not an appropriate vehicle for further appeal." The authorized representative of affected employees, Local Union 2243 of the United Steelworkers of America, which had elected party status before the judge, objects to the Secretary's motion to withdraw the citation. It argues that the judge's decision should be reversed and the citation affirmed because the evidence establishes the existence of a violation. The question for decision is whether the Commission may grant a motion by the Secretary to withdraw a citation despite an objection by a union-party that the evidence supports affirmance of the citations.[1]

In *American Bakeries Co.*, No. 83-131 (June 28, 1984), *Pan American World Airways*, No. 83-249 (May 31, 1984) and *Willamette Iron & Steel Co.*, No. 78-4198 (May 31, 1984), the Commission re-examined its precedents relating to employee and union participation. We held in *American Bakeries* that a union-party may not object to a motion by the Secretary to withdraw a citation, and overruled the contrary holding of *Republic Steel Co.*, 82 OSAHRC 67/E1, 10 BNA OSHC 2222, 1982 CCH OSHD ¶ 26,326 (No.

[1] At an earlier stage of this case, the Commission stated that it had reserved ruling on the Secretary's motion to withdraw the citation. *Copperweld Steel Co.*, No. 79-2600 (December 2, 1982), *pet. for review dismissed as premature*, No. 83-3039 (6th Cir. April 9, 1984).

81-656, 1982). In so holding, we relied on several court decisions that reviewed the respective roles of the Secretary and the Commission and held or implied that a union-party may not object to the Secretary's withdrawal of a citation. See *Donovan v. OSHRC (Mobile Oil Corp.)*, 713 F. 2d 918, 926-7 (2d Cir. 1983), *rev'g Mobil Oil Corp.*, 82 OSAHRC 45/A2, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982); *Donovan v. International Union, Allied Industrial Workers (Whirlpool Corp.)*, 722 F. 2d 1415, 1419-21 (8th Cir. 1983); *Oil, Chemical & Atomic Workers International Union v. OSHRC (American Cyanamid Co.)*, 671 F. 2d 643, 649-50 & n. 6 (D. C. Cir. 1982), *cert. denied*, 103 S. Ct. 206 (1983); *Marshall v. Sun Petroleum Products Co.*, 622 F. 2d 1176, 1187 (3d Cir.), *cert. denied*, 449 U. S. 1061 (1980); *Marshall v. OSHRC (IMC Chemical Group)*, 635 F. 2d 544, 551 (6th Cir. 1980).

Accordingly, the motion to withdraw the citation is granted.

CLEARY, Commissioner, dissenting:

I dissent from the majority's ruling that a union representative of affected employees may not object to a motion by the Secretary to withdraw a citation. I adhere to my opinion that an authorized employee representative that has elected party status has the right to object to the withdrawal of a citation. See *Republic Steel Corp.*, 82 OSAHRC 67/E1, 10 BNA OSHC 2222, 1982 CCH OSHD ¶ 26,326 (No. 81-656, 1982); *Cuyahoga Valley Ry.*, 82 OSAHRC 59/C3, 10 BNA OSHC 2156, 2158, 1982 CCH OSHD ¶ 26,296, pp. 33,227-28 (No. 76-1188, 1982) (concurring opinion), *pets. for rev. filed*, Nos. 82-3773 (6th Cir. Dec. 1 & 2, 1982). As the Commission has stated: "The Secretary cannot be permitted to exercise prosecutorial discretion in

a manner that would interfere with the right of affected employees to be heard as parties protecting their interest." *IMC Chemical Group*, 78 OSAHRC 95/C14, 6 BNA OSHC 2075, 2077 1978 CCH OSHD ¶ 23,149, p. 27,990 (No. 76-4761, 1978), *rev'd* 635 F. 2d 544 (6th Cir. 1980).

The facts of this case are particularly illustrative of the probable benefit to the ends of this statute that employee participation might produce. The facts are, roughly, as outlined in the Judges decision and the briefs, that the Secretary brought a 5(a)(1) charge based on an explosion in the Copperweld plant because of molten steel enveloping a puddle of water. The Administrative Law Judge vacated the citation, and the Secretary filed a petition for discretionary review, which was granted. Subsequently, the Secretary filed a motion to withdraw the direction for review, and the employees' representative, who was a party to this case, objected.

The majority dismisses the union objection on the basis that a union-party may not object to a motion by the Secretary to withdraw a citation. In this case, there was an accident that precipitated the Secretary's investigation. It involved molten metal with a temperature close to 3,000 degrees, overfowing and contacting water in a pit which caused an explosion that blew out windows of a control room 30 feet away, and spewed slag out of a 35-foot deep tapping pit onto a platform where employees had been standing. Four employees nearby ran from the explosion; one employee suffered minor injuries.

Certainly, many factors would bear on whether or not there is a violation of the Act in this case, including (as the Judge points out): The volume of water in the pit, the amount of molten steel which might overflow a ladle, the depth and width of the pit, the type of construction, and the

fact that the ladle was positioned to absorb most of the shock. Thus, I make no attempt to decide the case at this point, but employee concern about whether this type of accident may or may not recur is certainly worthy of this Commission's attention.

The employee party may be in the best position to know if a recognized hazard is present, and may well be able to present the best evidence as to the existence of a violation. Accordingly, I would consider the union's objections to the Secretary's motion to withdraw before deciding whether to grant or deny the motion, rather than give the Secretary the unfettered discretion to act in a manner potentially at odds with the rights of a party and the purposes of the Act.

APPENDIX A7

34,486 Decisions 691 8-7-84

For further action, if any, see Case Table ¶ 7995.

[¶ 26,920] Pan American World Airways, Inc.

Text of Review Commission's decision dated May 31, 1984. OSHRC Docket No. 83-249. The Judge's decision appears at 1984 OSHD ¶ 26,782.

Settlement Agreements — Scope of Employee Participation — Reasonableness of Abatement Period. The Judge's decision approving a settlement agreement over the objections of the employee representative union was affirmed on grounds the union had no right to object to the adequacy of the abatement methods prescribed in the settlement. A union may object only to the reasonableness of the abatement period specified in the agreement; because the union had made no such objection, the Judge properly approved the agreement. The decision was in agreement with decisions by four appellate courts. All decisions to the contrary were overruled.

Back reference: ¶ 4608.

Elizabeth L. Guerin and Andrew J. Wallace for the employer. Jay S. Berke for the Secretary. Melvin Brackett for the employees.

[Text of Review Commission's Decision]

Before: ROWLAND, Chairman; CLEARY and BUCKLEY, Commissioners.

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U. S. C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678 ("the Act"). The Commission is an adjudicatory agency, independent of the Department of Labor and the Occupational Safety and Health Administration. It was established to resolve disputes arising out

1984 OSHD

For further action, if any, see Case Table ¶ 7995.

of enforcement actions brought by the Secretary of Labor under the Act and has no regulatory functions. See section 10(c) of the Act, 29 U. S. C. § 659(c).

The question for decision is whether an authorized representative of affected employees may object to a method of abatement prescribed in a settlement agreement between the Secretary of Labor and an employer. We have reexamined Commission precedent in light of several recent appellate court decisions and hold that the representative may not so object.

The Secretary issued to Pan American World Airways, Inc. ("Pan Am") a citation alleging a violation of the exit door standard at 29 C. F. R. § 1910.36(b)(4). The citation alleged that electromagnetic door locks installed on 24 exit doors prevented "free and unobstructed egress" from an airport building. Pan Am had installed the electromagnetic door locks to prevent pilferage. After Pan Am filed a notice of contest and discovery commenced, the Secretary and Pan Am agreed upon a settlement. The settlement prescribed, among other things, modification to the electromagnetic door lock system, instruction of employees in the operation of the new system, and the installation of panic bars on doors in two areas. A ten-week abatement period (originally set to end on January 30, 1984) was prescribed. Pan Am also agreed to pay a penalty and to withdraw its notice of contest.

Air Transport Local 504 of the Transport Workers Union, AFL-CIO, which had elected party status, objected to the adequacy of the abatement methods prescribed in the settlement agreement. After holding a hearing, Administrative Law Judge Jerome C. Ditore concluded that the union had no right to object to the settlement on that

ground but that it could object to the reasonableness of the abatement period. The judge found that the union had not objected to the abatement period and therefore approved the settlement. The union sought discretionary review, which was granted.

The question of the right of a union that has elected party status to object to the abatement methods prescribed in a settlement agreement has been considered in many Commission and appellate court opinions. Since the Commission last considered the issue, four courts of appeals have issued decisions disapproving the Commission's holding that a union has the right to object to the adequacy of abatement methods prescribed in a settlement agreement. *Donovan v. OSHRC (Mobil Oil Corp.)*, 713 F. 2d 918 (2d Cir. 1983), rev'g *Mobil Oil Corp.*, 82 OSAHRC 45/A2, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982); *Donovan v. International Union, Allied Industrial Workers (Whirlpool Corp.)*, 722 F. 2d 1415 (8th Cir. 1983); *Donovan v. United Steelworkers (Monsanto Co.)*, 722 F. 2d 1158 (4th Cir. 1983); *Donovan v. Oil, Chemical & Atomic Workers International Union (American Petrofina Co.)*, 718 F. 2d 1341 (5th Cir. 1983) (following other circuits to prevent "administrative chaos"), cert. denied, 52 U. S. L. W. 3819 (U. S. May 14, 1984) (No. 83-1298). These courts of appeals joined several others that had already held or implied that unions lack such a right: *Oil, Chemical & Atomic Workers International Union v. OSHRC (American Cyanamid Co.)*, 671 F. 2d 643, 650 & n. 7 (D. C. Cir. 1982), cert. denied, 103 S. Ct. 206 (1983); *Marshall v. Oil, Chemical & Atomic Workers International Union (American Cyanamid Co.)*, 647 F. 2d 383 (3d Cir. 1981), following *Marshall v. Sun Petroleum Products Co.*, 622 F. 2d 1176 (3d Cir.) cert. denied, 449 U. S. 1061 (1980).

See also *Marshall v. OSHRC (IMC Chemical Group)*, 635 F. 2d 544 (6th Cir. 1980); *Automobile Workers v. OSHRC (Ford Motor Co.)*, 557 F. 2d 607 (7th Cir. 1977). We agree with the appellate court decisions cited above and hold that a union lacks the right to object to the adequacy of the abatement methods specicied in a settlement agreement between the Secretary and an employer, and that a union may object only to the reasonableness of the abatement period specified by the agreement. All decisions to the contrary are overruled. Inasmuch as the union has not objected to the abatement date in the settlement agreement, the judge's decision approving the agreement is affirmed.[1]

CLEARY, Commissioner, dissenting:

Like Judge Pollak, I take a "more spacious view" of employee rights. See *Marshall v. Sun Petroleum Products Co.*, 622 F. 2d 1176, 1191 (3d Cir.), cert denied, 449 U. S.

[1] The union's petition for review suggests that it objected before the judge to the reasonableness of the abatement period in the settlement agreement. The judge found otherwise, as do we. At the hearing held by Judge Ditore on the union's objections to the settlement, the judge invited the union to state an objection to the abatement period but the union did not do so.

The union's petition also argues that the settlement agreement was not served in accordance with Commission Rule 100(c). The settlement agreement was not served on counsel for the union, but at the hearing counsel for the union stated that he did have a copy of the settlement agreement. The union has not claimed that any shortness of notice prevented it from formulating an objection to the abatement date. Indeed, after the hearing, the judge waited far longer than the ten-day objection period prescribed by Commission Rule 100(c) before approving the settlement agreement. The union's objections therefore do not provide a basis for challenging the judge's approval of the settlement.

1061 (1980) (Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania sitting by designation, dissenting in part).

In my view, employees should be heard on all aspects of employer-contested citations at all stages of Review Commission proceedings, including settlement. I stated my reasons for this view in exhaustive detail in *Mobil Oil Corp.*, 82 OSHRC 45/A2, 10 BNA OSHC at 1920, 1982 CCH OSHD ¶ 26,187 at 33,034 (No. 77-4386, 1982), *rev'd*, 713 F. 2d 918 (2d Cir. 1983). Briefly, nothing in the Act, its legislative history, or basic principles of federal regulatory action justifies exclusion of employee evidence; but the most elementary principles of law militate in favor of hearing all evidence likely to throw light on issues in dispute.

The Act itself specifies that employees are entitled to party status in employer-initiated proceedings. Section 10(c), 29 U. S. C. § 659(c). The hallmarks of party status are the right to present evidence, to be heard in opposition to all other parties, to participate fully in all aspects of the case, both substantive and procedural. The Act itself does not define "party" more narrowly, and nothing in the legislative history supports a more limited definition. (To the extent that the legislative history mentions employee participation in Commission proceedings at all, the quoted passages are virtually identical in language to section 10(c) itself and therefore cannot support a restrictive interpretation. See SUBCOMMITTEE ON LABOR, SENATE COMMITTEE ON LABOR & PUBLIC WELFARE, THE LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 at 155, 414 (1971)).

Judge Pollak, in his partial dissent in *Sun Petroleum*, *supra*, reviewed the legislative history of the section as follows:

The anomalous limitation not expressed in the text of Section 10(c) is supplied, so the court insists, by the report of the Senate Committee on Labor and Public Welfare. It is of course true, as the court notes, that the Committee's report recites that Section 10(c) "gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long to challenge the citation on that ground." But the report says more. The entire relevant passage, including the language relied on by the court, shows the Committee's understanding that an employee/union challenge to the length of the proposed abatement period is but one of two modes of employee/union participation in Commission proceedings — two *distinct* modes linked by the conjunctive "also."

If the employer decides to contest a citation or notification, or proposed assessment of penalty, the Secretary must afford an opportunity for a formal hearing under the Administrative Procedure Act. Based upon the hearing record the Secretary shall issue an order confirming, denying, or modifying the citation, notification, or proposed penalty assessment. The procedural rules prescribed by the Secretary for the conduct of such hearings must make provision for affected employees or other representatives to participate as parties.

Section 10(c) *also* gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground. Such challenges must be filed within 15 days of the issuance of the citation, and an opportunity for a hearing must be provided in similar fashion to hearings when an employer

contests. The employer is to be given an opportunity to participate as a party.[4] (Emphasis added.)
Sun Petroleum, 622 F. 2d at 1190.

Much has been made of the fact that unrestricted employee participation would interfere with the Secretary's prosecutorial discretion. Both the Act and the legislative history show that Congress intended for employees to play a central and active role in OSHA proceedings. For example, the Secretary *must* investigate employee complaints of OSHA violations, and he *must* inform the complaining employees of his reasons if he does not issue a citation for a serious violation or an imminent danger. See sections 8(g), 9(a) 29 U. S. C. §§ 657(g), 658(a). The legislative history shows that Congress recognized and attached significance to the fact that employees have valuable knowledge about their working conditions. LEGISLATIVE HISTORY at 430, 448. Moreover, absolute and unreviewable prosecutorial discretion is not in harmony with the Administrative Procedure Act, which has long imposed a presumption of reviewability on administrative discretionary powers. See discussion in DAVIS, ADMINISTRATIVE LAW TEXT 518-523 (3d ed. 1972).

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[4] Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92 Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 at 154-155 (Comm. Print 1971) [herein cited as Legislative History]. The bill referred from committee, which is addressed in the above passage, contemplated hearings within the Department of Labor; hence, the allusion in the excerpt to hearings before the Secretary. As detailed in the opinion of the court, however, the enforcement scheme was modified on the Senate floor to provide for review before an independent administrative body in the form of the review Commission. Apart from the substitution of the Review Commission for the Secretary, procedures set forth in the final Act are, in all relevant respects, identical to those which are the subject of this Committee report.

Set against this striking absence of support for limited employee participation is the fundamental principle that relevant, probative and material evidence should be heard unless there are important policy reasons for exclusion.

> [T]he whole machinery of jurisprudence, in all its branches, is contrived for the purpose of enabling the judging power to determine on the truth or falsehood of every litigation proposition. This is to be done by hearing and examining evidence, that is to say, hearing and examining every thing that will contribute to bring the mind to the determination required. If we refuse to hear what will, in any degree, produce this effect, we must determine on imperfect evidence; and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather than a just determination.
>
> Livingston, INTRODUCTORY REPORT TO THE CODE OF EVIDENCE in COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 411, 421 (1873).

Limiting employee participation prevents the trier of fact from considering all probative, relevant and material evidence — without advancing any important policy. Worse yet, exclusion of employee evidence undermines the purpose of the Act in direct proportion to the employees' ability to prove that a hazard exists or that an abatement plan is inadequate.

Although the Fifth Circuit Court of Appeals ultimately held, for reasons of uniformity, that employees have only limited participatory rights in employer-initiated proceedings, it first explained why, if it were writing "on a clean slate," it would hold otherwise. *Donovan v. Oil,*

Chemical, and Atomic Workers International Union (American Petrofina), 718 F. 2d 1341 (5th Cir. 1983), *cert. denied*, — U. S. — (1984).

Assuming that "Congress used words as they are commonly used and ordinarily understood," the Fifth Circuit concluded that the word "party" connotes "persons entitled to participate fully in litigation." *Id*. at 1349. The fact that Congress explicitly limited employee participatory rights in employee-initiated proceedings seemed to the court evidence that Congress meant its unqualified assignment of party status in employer-initiated contests to be read literally.

The Secretary argued in *American Petrofina* that employee rights are yoked to the status of the employer's participation so that even if the employer's notice of contest opens the door to plenary employee participation, the employer's withdrawal of the notice of contest would return employees to the status of abatement date challengers only. The court, however, concluded that employees in employer-initiated contests are analogous to intervenors in a civil lawsuit whose claims can proceed to decision even after the original parties have settled or sought dismissal. "The weight of authority in the United States Courts of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action." *Id*. at 1351, quoting *U. S. Steel v. EPA*, 614 F. 2d 843, 845 (3d Cir. 1979).

The Fifth Circuit disagreed, as do I, with those courts that have limited employee participation in part on the ground that this is necessary to the Secretary's authority as prosecutor under the Act. "Focussing solely on the prosecutorial phase of the process misses the issue in the case.

The Union's rights arise at the adjudicatory stage, the administration of which falls within the Commission's bailiwick." *Id*. at 1349.

In short, the Fifth Circuit found that on balance there is more evidence favoring full employee participation in employer-initiated proceedings than against it, that Congress intended employees to be more than mere "gadflies." "[W]e understand Congress to have attempted to erect a comprehensive structure that would allow for meaningful participation of those most personally concerned with workplace safety — the workers." *Id*. I agree.

I am mindful of the fact that full employee involvement may cause delay in some small proportion of the cases. But it seems to me delay for purposes of hearing all the facts is to be preferred over final orders based on incomplete evidence. In any case, I find the Secretary's current horror of delay somewhat strange; during the first eight years of the Act, the Secretary submitted literally thousands of proposed settlements for Commission approval with no apparent ill result. This Commission has now been in existence for almost thirteen years, but the number of cases in which the Secretary has considered it important enough to challenge Commission jurisdiction over the substance of settlements are fewer than ten. Thus, interference with administration of the Act or the judicial process is for all practical purposes nonexistent, and at one point the Secretary had an apparent policy of seeking employee comment and cooperation in arriving at settlement agreements. See *Reynolds Metals Company*, 79 OSHRC 4/A2, 7 BNA OSHC 1042, 1979 CCH OSHD ¶ 23,295 (No. 78-2485, 1979); *Gardinier, Inc., and International Chemical Workers Local 439*, 79 OSHRC 80/D5, 7 BNA OSHC 1738, 1979 CCH OSHD ¶ 23,892 (No. 78-3895, 1979); *Kaiser Alu-*

For further action, if any, see Case Table ¶ 7995.

minum & Chemical Corporation, 78 OSHRC 103/A2, 6 BNA OSHC 2172, 1976-77 CCH OSHD ¶ 21,398 (No. 76-2293, 1978), *rev'd*, 647 F. 2d 171 (9th Cir. 1981) (Secretary abrogated settlement agreement on employee representative objection); *I. T. T. Thompson Industries, Inc.*, 78 OSHRC 70/D10, 6 BNA OSHC 1944, 1978 CCH OSHD ¶ 22,944 (Nos. 77-4174 and 77-4175, 1978). I would urge the Secretary to return to this policy and encourage participation in settlements by representatives of employees in those instances where they have entered a case as a party.

OPPOSITION

BRIEF

(2) (2)

Nos. 84-1634 and 85-170

Supreme Court, U.S.
FILED
AUG 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

October Term, 1984

CUYAHOGA VALLEY RAILWAY COMPANY,
Petitioner,

vs.

UNITED TRANSPORTATION UNION

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

No. 84-1634

WILLIAM E. BROCK, SECRETARY OF LABOR,
Petitioner,

vs.

UNITED TRANSPORTATION UNION

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

No. 85-170

BRIEF OF RESPONDENT, UNITED TRANSPORTATION UNION, IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD M. HUHN, *Counsel of Record*
C. RICHARD GRIESER
GRIESER, SCHAFER, BLUMENSTIEL & SLANE CO., L.P.A.
261 West Johnstown Road
Columbus, Ohio 43230
Telephone: (614) 475-9511
Counsel for Respondent
United Transportation Union

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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PARTIES TO THIS PROCEEDING

Cuyahoga Valley Railway Company was the petitioner in the Court of Appeals in Case No. 82-3773. The Secretary of Labor was the petitioner in the Court of Appeals in Case No. 82-3771. The respondents in both cases were the United Transportation Union and the Occupational Safety and Health Review Commission. The cases were consolidated for review by the Court of Appeals.

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Nos. 84-1634 and 85-170

Supreme Court of the United States

October Term, 1984

CUYAHOGA VALLEY RAILWAY COMPANY,
Petitioner,

vs.

UNITED TRANSPORTATION UNION
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

No. 84-1634

WILLIAM E. BROCK, SECRETARY OF LABOR,
Petitioner,

vs.

UNITED TRANSPORTATION UNION
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

No. 85-170

BRIEF OF RESPONDENT, UNITED TRANSPORTATION UNION, IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

This matter involves separate Petitions for a Writ of Certiorari directed to the United States Court of Appeals

for the Sixth Circuit. One filed by the Cuyahoga Valley Railway Company and the other by William E. Brock, Secretary of Labor. Inasmuch as the issues and the respondents are the same, the cases were consolidated for review below. This response is, therefore, directed to both Petitions.

In the interest of brevity, respondent, United Transportation Union (hereinafter the "Union"), will not submit a separate statement of the case. The Union does, however, want to clarify one portion of the statement submitted by petitioner, Cuyahoga Valley Railway Company. At the hearing before Administrative Law Judge Erwin L. Stuller, the Union objected to the decision of the Secretary of Labor (hereinafter the "Secretary") to withdraw its citation against the Cuyahoga Valley Railway Company (hereinafter "Cuyahoga Valley Railroad") because the Union believed the working condition involved was not covered by the Federal Railroad Administration. At that time Judge Stuller took the case under advisement and stated that if the Union wanted to submit something in writing, it would be made part of the record. Judge Stuller did not, however, specify any time requirement for the Union to file its written objections.

Within one week an attorney representing the Union wrote Judge Stuller that unless advised to the contrary, the Union would file a brief at the earliest possible date. Judge Stuller, however, vacated the Secretary's citation without any further notification to the parties and without considering the Union's objections which were set forth in a brief that Judge Stuller received one day after the date of his written order vacating the Secretary's citation.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals below to affirm the decision of the Occupational Safety and Health Review Commission (hereinafter the "Commission") to set aside the order of the Administrative Law Judge and remand the case for hearing on the Union's objections to the withdrawal of the Secretary's citation is correct. Under the particular facts of this case, wherein the Secretary filed a formal complaint and Cuyahoga Valley Railroad filed an answer; and wherein the Union had elected party status, the Secretary's role as prosecutor becomes more limited and the Commission's role as the adjudicative body takes over. It was, therefore, not violative of the terms of the Occupational Safety and Health Act (hereinafter the "Act") or its legislative history for the Commission to remand this case so that the Union may have the merits of its objections heard.

Furthermore, the decision of the Court below to permit the Union to do more than merely challenge the reasonableness of abatement periods is correct. The Act requires the Secretary to prescribe procedural rules for employees or their representatives to participate as parties. The decision of the Court below merely refuses to give the term "parties" an unreasonably restrictive interpretation. The decision of the Court of Appeals follows the spirit and overall intent of the Act, which is to insure that dangerous and hazardous working conditions are remedied so that employees have a safe, hazard-free environment wherein to work.

ARGUMENT

I. The Secretary Of Labor's Role As Prosecutor Of Occupational Safety And Health Act Violations Becomes Limited Once The Adjudication Process Begins Under The Jurisdiction Of The Occupational Safety And Health Review Commission.

The Court of Appeals below carefully and correctly distinguished between the roles of the Secretary and the Commission in cases such as this case which involves a citation and notice of contest, followed by issuance of a complaint by the Secretary, answer by the employer and election of party status by the Union and one where a settlement is reached or citation vacated prior to the filing of a complaint and answer. See *Marshall and IMC Chemical Group v. OSHRC*, 635 F.2d 544 (6th Cir. 1980). The Court below recognized that in such a case as this the adversarial process was well advanced and, as such, the Commission as an adjudicative body, had control of the case and, therefore, authority as well to review the Secretary's decision to withdraw the citation. *Donovan v. United Transportation Union*, 748 F.2d 340, 343 (6th Cir. 1984).

Since the decision below the Commission itself has adopted a new position prohibiting an employee or employees' representative from objecting to withdrawal of a citation in all cases. See *American Bakeries Co.*, Empl. Safety & Health Guide, ¶26,951 (1984); *Copperweld Steel Co.*, Empl. Safety & Health Guide, ¶26,956 (1984). This new position, however, is not based on a sound, well grounded change in the legal reasoning and interpretation the Commission utilized in its prior decisions, but rather is a natural, albeit unfortunate reaction by the Commis-

sion to the number of court decisions against it. Nowhere in either *American Bakeries* or *Copperweld Steel* does the Commission perform the type of cogent analyzation of the Act and the purposes of the Act that is found in the decision below and the deference granted to these two recent decisions should, therefore, be tempered in kind. As such, the decision below remains correct and should stand.

II. Once An Employee Or His Authorized Representative Has Elected Party Status Under the Occupational Safety And Health Act, His Right To Challenge A Citation Is Not Limited Only To The Reasonableness Of The Time Fixed For Abatement Of The Violation.

The issue of the role employees or their representatives may play in the enforcement of citations revolves around an interpretation of §10(C) of the Act and Rule 20(a) of the Commission's Rules of Procedure. The interpretations of the Section of the Act and the Commission's rule have been the subject of much discussion by the Commission and the courts.

Over the years the Commission has taken the view that employee representatives can object to more than just the reasonableness of the period set for abatement of a cited violation. The Commission's position on this issue is exhaustively set forth in *Mobil Oil Corporation*, 10 OSHC (BNA) 1905, rev., 713 F.2d 918 (2nd Cir. 1983).

As the petitioners pointed out, the Commission has reversed its decision in *Pan American World Airways*, Empl. Safety & Health Guide (CCH), ¶26,920 (1984) and now states that employees and their representatives are limited to objecting to the reasonableness of the abatement period. However, once again the Commission's decision is not based

on a review and rethinking of the reasoning upon which their former position was grounded. Rather the new position is a reaction and response to a string of decisions of Courts of Appeal which have reached a more restrictive interpretation of the Act as it relates to the participation of employees and their representatives.

The Court below, as did the Commission formerly, interpreted the legislative history of the Act with the underpinnings of legislative purpose and intent. It arrived at a decision correctly permitting employees a meaningful role as participants when they elect to participate as parties to proceedings under the Act. The decision of the Court below violated neither the spirit nor purpose of the Act, but instead supported it and for that reason should stand.

CONCLUSION

For the foregoing reasons, both Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD M. HUHN, *Counsel of Record*
C. RICHARD GRIESER
GRIESER, SCHAFER, BLUMENSTIEL &
SLANE CO., L.P.A.
261 West Johnstown Road
Columbus, Ohio 43230
Telephone: (614) 475-9511
Counsel for Respondent
United Transportation Union

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

CUYAHOGA VALLEY RAILWAY COMPANY
84-1634 *v.*
UNITED TRANSPORTATION UNION ET AL.

WILLIAM E. BROCK, SECRETARY OF LABOR
85-170 *v.*
UNITED TRANSPORTATION UNION ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 84-1634 AND 85-170. Decided November 4, 1985

PER CURIAM.

The Secretary of Labor is authorized to inspect work sites to uncover noncompliance with the Occupational Safety and Health Act. 29 U. S. C. § 657(a). If, as a result of such an inspection, the Secretary discovers a violation of the Act, he is authorized to issue a citation to the employer fixing a reasonable time for the abatement of the violation, § 658(a), and assessing a penalty for the violation. § 666. The employer then has 15 days in which to contest the citation. § 659(a). Similarly, employees have 15 days in which to challenge as unreasonable "the period of time fixed in the citation for the abatement of the violation." § 659(c). See generally *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 9, n. 11 (1980). The statute and rules of the Occupational Safety and Health Review Commission also permit affected employees to participate as parties in any hearing in which the employer contests the citation. 29 U. S. C. § 659(c), 29 CFR § 2200.20(a) (1985).

If an employer contests the citation, and the Secretary intends to seek its enforcement, the Secretary must file a complaint with the Commission within 20 days, and the employer must file an answer within 15 days. 29 CFR § 2200.33 (1985). Once these pleadings are filed, a hearing to deter-

mine the validity of the citation will be held before an Administrative Law Judge, with discretionary review by the Commission. 29 U. S. C. §§ 659(c), § 661(j).

In the present case, the Secretary cited Cuyahoga Valley Railway Company for a violation of the Act. Cuyahoga contested the citation, the Secretary filed a complaint with a Commission, and Cuyahoga filed an answer. Respondent United Transportation Union, which represents Cuyahoga employees, properly moved to intervene in the proceedings. At the hearing, however, the Secretary moved to vacate the citation on the ground that the Federal Railway Administration, not the Secretary, had jurisdiction over the relevant safety conditions. Despite the Union's objection, the ALJ granted the Secretary's motion and vacated the citation. Thereafter, the Commission directed review of the ALJ's order. The Secretary promptly objected to this action, asserting that part of the citation involved matters beyond the reach of the Act and that additional portions of the citation did not warrant litigation because of the state of the evidence. He also stated that the record before the Commission was inadequate to resolve the issue posed.[1] Some six years later, the Commission rejected this submission and remanded the case to the ALJ for consideration of the union's objections.

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[1] Vacating the citation thus did not rest solely on jurisdictional grounds. Nor did the Court of Appeals' decision sustaining the Commission's order focus on jurisdiction. Its holding would permit review by the Commission of the Secretary's withdrawal of any citation, whatever the reason, provided the adversarial process was sufficiently advanced to vest control in the Commission. For these reasons and because the issue relates to the statutory division of authority between the Secretary and the Commission, rather than the question of judicial review of administrative action, the case does not pose the question whether an agency's decision, resting on jurisdictional concerns, not to take enforcement action is presumptively immune from judicial review under § 701(a)(2) of the Administrative Procedure Act. See *Heckler* v. *Chaney*, —— U. S. ——, ——, n. 4 (1985).

The Court of Appeals for the Sixth Circuit affirmed the Commission's holding that it could review the Secretary's decision to withdraw a citation. *Donovan* v. *United Transportation Union*, 748 F. 2d 340 (CA6 1984). The court recognized that the Secretary "has the sole authority to determine whether to prosecute" a violation of the Act. 748 F. 2d, at 343. Here, however, the court found that the Secretary "had already made the decision to prosecute by filing a complaint and that complaint had been answered at the time the Secretary attempted to withdraw the citation." *Ibid.* Because the "adversarial process was well-advanced at the time the Secretary attempted to withdraw the citation," the court reasoned that the Commission, "as the adjudicative body, had control of the case and the authority to review the Secretary's withdrawal of the citation." *Ibid.*[2]

Contrary to the Sixth Circuit's decision, eight other courts of appeals have held that the Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Occupational Health and Safety Act. *Donovan* v. *Allied Industrial Workers (Midland)*, 760 F. 2d 783, 785 (CA7 1985); *Donovan* v. *Local 962, International Chemical Workers Union (Englehard)*, 748 F. 2d 1470, 1473 (CA11, 1984); *Donovan* v. *International Union, Allied Industrial Workers (Whirlpool)*, 722 F. 2d 1415, 1422 (CA8 1983); *Donovan* v. *United Steelworkers of America (Monsanto)*, 722 F. 2d 1158, 1160 (CA4 1983); *Donovan* v. *Oil, Chemical and Atomic Workers International (American Petrofina)*, 718 F. 2d 1341, 1352–1353 (CA5 1983), cert. denied, —— U. S. —— (1984); *Donovan* v. *Occupational Safety and Health Review Commission (Mobil Oil)*, 713 F. 2d 918, 926–927 (CA2 1983);

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[2] The Court of Appeals also relied to some extent on the position of the Commission as to the scope of its powers. The Commission, however, has since revised its view and now declines to review the Secretary's dismissal of a citation. *Pan American World Airways, Inc.*, 1984 O. S. H. Dec. (CCH) ¶ 26,920; *American Bakeries Co.*, 1984 O. S. H. Dec. ¶ 26,951; *Copperweld Steel Co.*, 1984 O. S. H. Dec. ¶ 26,956.

Oil, Chemical and Atomic Workers International v. *Occupational Safety and Health Commission (American Cynamid)*, 671 F. 2d 643, 650–651 (CADC), cert. denied, 459 U. S. 905 (1982); *Marshall* v. *Sun Petroleum Products Co.*, 622 F. 2d 1176, 1187 (CA3), cert. denied, 449 U. S. 1061 (1980). We agree with the decisions of these courts.

It is apparent that the Court of Appeals' decision is inconsistent with the detailed statutory scheme which contemplates that the rights created by the Act are to be protected by the Secretary. See *Atlas Roofing Co.* v. *Occupational Safety and Health Commission*, 430 U. S. 442, 444–447 (1977); *Mobil Oil*, *supra*, 713 F. 2d, at 927; *Sun Petroleum Products*, *supra*, 622 F. 2d, at 1187. It is also clear that enforcement of the Act is the sole responsibility of the Secretary. *Oil, Chemical and Atomic Workers International* v. *Occupational Safety and Health Commission*, *supra*, 671 F. 2d, at 649. It is the Secretary, not the Commission, who sets the substantive standards for the work place, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions, 29 U. S. C. § 658. A necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer. *Whirlpool*, *supra*, 722 F. 2d, at 1420; *Mobil Oil*, *supra*, 713 F. 2d, at 927. The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections. Its authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

The Sixth Circuit's conclusion that the Commission can review the Secretary's decision to withdraw a citation would discourage the Secretary from seeking voluntary settlements with employers in violation of the Act, thus unduly hampering the enforcement of the Act. *Whirlpool*, *supra*, 722 F. 2d, at 1420; *Mobil Oil*, *supra*, 713 F. 2d, at 927. Such a procedure would also allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend. *Whirlpool*, *supra*, 722 F. 2d, at 1419; *Mobil Oil*, *supra*, 713 F. 2d, at 930–931; *Sun Petroleum Products*, *supra*, 622 F. 2d, at 1187. Indeed, the Commission itself was created to avoid giving the Secretary both prosecutorial and adjudicatory powers. See generally Staff of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, Pub. L. No. 91–596) (Comm. Print 1971). Accord *Whirlpool*, *supra*, 722 F. 2d, at 1419; *Mobil, Oil*, *supra*, 713 F. 2d, at 930–931, and n. 21. The other courts of appeals to address this problem have recognized the distinct roles of the Secretary and the Commission and accordingly have acknowledged that the Secretary's decision to withdraw a citation against an employer of the Act is not reviewable by the Commission. Based on these considerations, the petitions for certiorari are granted and the judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN and JUSTICE BLACKMUN dissent from summary disposition. They would grant certiorari and set the cases for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 41, 51–52 (1982) (MARSHALL, J., dissenting).